EMPLOYMENT TRIBUNALS

Claimant: R Williams

Respondent: John Lewis PLC (1) & The Orange Square Company Ltd (2)

Heard at: Cambridge Employment Tribunal (in private) **On: 22 July 2019**

Before: Employment Judge Johnson (sitting alone)

Appearances
For the claimant: Mr Jackson (solicitor)
For the first respondent: Mr Graham (counsel)
For the second respondent: Ms Meredith (counsel)

RESERVED JUDGMENT

1. The claims brought against both Respondents under the Equality Act 2010 and the complaint of public interest disclosure under section 43B of the Employment Rights Act 1996 are dismissed as the Tribunal has no jurisdiction to hear them;

2. The First Respondent is discharged from the proceedings; and,

3. The claim of automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996 against the Second Respondent will be decided at a full merits hearing on a date to be fixed.

REASONS

The claim

(1) The preliminary hearing was listed to determine the issue of whether or not the Claimant's claims brought under the Equality Act 2010 and the whistleblowing claim were presented out of time and if not, whether there were reasonable grounds to extend time based upon the applicable statutory tests.

(2) The Claimant, Mr Ross Williams, who describes himself as a gay man, was employed by the Second Respondent ("Orange Square") as a sales person in

its concession in the fragrance and beauty department of the First Respondent's ("John Lewis") store in Cambridge. His employment commenced on 14 February 2017 and ended with his dismissal on 22 April 2018.

(3) The Preliminary Hearing took place in Cambridge on 22 July 2019 and a Reserved Judgment was reached on 23 July 2019. At the hearing, I was provided with the paginated bundle of papers produced by John Lewis's representative Mr Graham and which was agreed by the parties at the commencement of the hearing. Additionally, further documents were provided by the Respondents prior to the cross examination of the Claimant and which were shared with the parties and Tribunal. No objections were raised by the Claimant or his representative and I allowed the documents to be admitted.

(4) The Claimant had not produced a witness statement in advance of the hearing. Concerns were raised by the Respondents' representatives regarding the absence of a witness statement and the impact that this would have upon the Claimant's ability to prove that the relevant complaints were brought in time or that discretion to extend time should be granted in accordance with the relevant legal tests. The Claimant's representative explained that he had only obtained instructions to represent his client on 19 July and had had limited time in which to properly prepare for the hearing. I decided that it would satisfy the overriding objective of the Tribunal's Rules of Procedure and be in the interests of justice for the Claimant to give oral evidence in any event. This was on the understanding that the issues to be considered by the Tribunal were relatively narrow and it would avoid the risk of further delay occurring within the proceedings. Although Mr Jackson asked that I adopt an inquisitorial role and take the Claimant through his evidence, I noted that all parties were represented and it would be appropriate for examination to be conducted by them, with judicial questioning taking place at the appropriate time.

(5) In this case, findings of fact are made on the balance of probabilities.

The Issues

(6) Following a Case Management Hearing before Employment Judge Foxwell at the Cambridge Employment Tribunal on 14 January 2019, it was established that there were 4 potential claims that could be considered by the Tribunal:

(a) A complaint of unfair dismissal under the Employment Rights Act 1996 ("ERA");
(b) A complaint of harassment under section 26 of the Equality Act 2010 ("EQA");
(c) A complaint of victimisation under section 27 of the EQA; and,
(d) A complaint of public interest disclosure under s43B of the ERA ("whistleblowing").

(7) Although the Tribunal was satisfied at case management that the claim of unfair dismissal was brought in time, it identified potential issues of time in relation to

the complaints under the EQA and the whistleblowing complaint. Accordingly, the Tribunal made an order for a further closed preliminary hearing ("CPH"), but with permission for the parties to request that the case be amended to an open preliminary hearing ("OPH") to determine the issues of time. This was originally listed to take place on 25 March 2019. A full merits hearing was also listed to take place on 1 to 12 July 2019, (subsequently varied to 22 July to 2 August 2019).

(8) It should be noted that although the Claimant has been unrepresented from time to time, he was represented at the Case Management Hearing by Ms S Bewley of counsel.

(9) In accordance with the Case Management Order, the Claimant presented a list of issues on 29 January 2019 which identified issues relating to the 4 complaints identified in paragraph (8) (above).

(10) The Respondents in turn presented Amended Grounds of Resistance during mid to late February 2019. John Lewis made an application that the CPH be converted to an OPH to consider the question of time limits as well as further directions.

(11) The further CPH listed for 25 March 2019 was considered by the Tribunal to have insufficient time to allow the hearing to be amended to an OPH. Ultimately it was decided by the Tribunal that as it was unlikely that the case on that date could be heard and relisted it to 26 June 2019.

(12) Following a further application by the John Lewis' and Orange Square's solicitors, the Tribunal decided that due to unavailability of witnesses, it would not be possible to hear the merits hearing on 22 July to 2 August. As a consequence, the 22 July date was converted to an open preliminary hearing to consider the question of whether the Claimant's claims were out of time.

(13) The OPH took place on 22 July 2019 and the Claimant attended with his solicitor Mr Jackson.

(14) A number of issues were addressed at the beginning of the hearing and it was recognised that the Tribunal required time to read the documents produced that morning.

(15) One issue that did concern the Tribunal was contained within the Claimant's list of issues served on the Respondents' solicitors on 20 March 2019. This was because a complaint of direct sexual orientation discrimination was included as the issues to be considered by the Tribunal. The Tribunal noted that the case management order of EJ Foxwell on 14 January 2019 did not include direct discrimination as a complaint that would be considered at the final merits hearing. Accordingly, Mr Jackson made an application to amend his client's claim to include this specific complaint. The Respondents' counsel objected.

(16) Having listened to submissions from all of the parties' representatives and taking into account the overriding objective at rule 2 of the Employment

Tribunals Rules of Procedure, I rejected the application. This was because I was satisfied that the Claimant was represented by counsel at the CPH on 14 January 2019, when the question of issues was properly discussed and where the purpose of that hearing was to narrow the issues to be considered at the final hearing. Even allowing for the fact that the claimant was originally without representation when he prepared his ET1 claim form, the opportunity to obtain advice concerning this issue had taken place and his representative could have reasonably made this application at the January CPH. The case management summary from that hearing was detailed and I was satisfied that the question of direct discrimination would have been considered by EJ Foxwell and it would have been included as a relevant ground of complaint if it had considered appropriate to do so. It was therefore unreasonable at this late stage for the proceedings to be widened again to include this additional complaint. Allowing this amendment would have given the Respondents' counsel good reason to argue that they had not had an opportunity to prepare their case in relation to this issue and they would potentially have required additional time to take instructions and to make further preparations. Given the additional delay that this might require and the earlier opportunities that the Claimant had to include this complaint at the January CPH, it would not be proportionate or in the interests of justice to allow the application to amend.

Findings of fact

(17) Before the Claimant's evidence was given, I became aware that there was a health issue relating to the Claimant that might have some bearing upon the consideration of the preliminary hearing. With the Claimant's permission, Mr Jackson explained that as he had only been properly instructed by the Claimant on 19 July, he had only been able to properly consider his client's case during the weekend. It transpired that his client had told him that he had 'AIDS' and at the relevant time, had been suffering symptoms relating to this condition which might have affected his ability to present his complaints to the Employment Tribunal. He explained that the Claimant had been reluctant to disclose this particular health issue given the stress that this might cause him, but he recognised that it was important to raise this with the Tribunal today.

(18) It was acknowledged that the Claimant had not provided any medical evidence in advance of this hearing and the Respondents' representatives were without instructions to accept that the Claimant had this condition. I was satisfied nonetheless that it would be in the interests of justice for the Claimant to give oral evidence and to be examined on this potentially relevant issue. However, I explained to the parties and their representatives that the Claimant would only be expected to give evidence concerning his health issues insofar as they related to the preliminary issue of presenting the complaints in time. Additionally, I advised that if it became clear during examination of the Claimant, that medcial evidence would be required in order that I could properly dispose of this issue, I would make the appropriate orders upon the conclusion of the Claimant's evidence.

(19) In considering the Claimant's health issue, I informed the parties that I had taken into account the provisions of the Equal Treatment Bench Book insofar as it relates to Sexual Orientation and also the relevant section in appendix B-34/5 concerning HIV and AIDS. I took notice that the HIV virus attacks the immune system and weakens the body's ability to fight infections, whereas AIDS is the final stage of HIV infection when the body can no longer fight certain infections and diseases such as TB and cancer. Additionally, I noted that while there is no cure for HIV, treatment with anti-retrovirals not only alleviates symptoms, but restores and maintains the immune system and can enable individuals to live a long and relatively normal life.

(20) I also asked whether any additional adjustments during the hearing were required of the Claimant with regards to his condition. He confirmed that there were none, but I asked him to inform me if he felt during the hearing that he needed a break.

(21) Any findings of fact that I have made relate solely to the determination of the preliminary issue.

(22) I noted that in considering this matter that there were few contemporaneous documents and that those which were produced, had been provided by the Respondents. The Claimant had not provided any documentation concerning his steps taken to resolve issues with John Lewis or Orange Square or subsequently with the Citizens Advice Bureau ("CAB") or ACAS. While he advised in evidence that additional documentation was available, I was surprised that it had not been disclosed in advance of the hearing. No further applications to disclose additional evidence were made by the Claimant's representative at the hearing.

(23) In relation to the issue of the Claimant's health, while he had not produced any documentation in support of his condition, I accept that he gave credible evidence that he had the HIV virus for a period in excess of 20 years. He controlled the condition using anti-retrovirals and was under the care of local medical practitioners who monitored his blood on a regular basis. I also accepted that from time to time his blood 'CD4 count' could drop to a level where his body's ability to fight infection could be significantly reduced. When an episode such as this took place, the Claimant was reluctant to go out of doors and mix with other members of the public where he might be exposed to viruses that could seriously affect his health.

(24) I felt that the Claimant gave a credible explanation of how stress and other factors could impact upon his CD4 count and that from December 2017 onwards, he experienced a decline in his CD4 levels. This continued into 2018 and he reached a stage by March to May 2018 where he was feeling sick and understandably anxious about being infected by viruses when outside his home. During this time, he spent a lot of time visiting his Mother in North Norfolk. However, I am satisfied that during this period, he was also spending time in Cambridge at his home address and so was not exclusively based at his Mum's house. This may be relevant because the Claimant informed the Tribunal that his Mum did not have internet at her home, whereas the Claimant

was clearly familiar with email and internet based research and indeed attended the Tribunal hearing with a tablet device and did not appear to rely upon paper based notes.

(25) I am satisfied that having heard the Claimant's evidence concerning his health issues, he had a condition which quite understandably caused him a great deal of anguish. While he had no doubt sought to live as normal a life as possible, he faced challenges that impacted upon his day to day life. This was especially the case when his CD4 count fell and he felt vulnerable to illnesses that most of us would not expect to be particularly serious. However, taking into account the absence of documentary and medical evidence concerning the Claimant's health issues, I am not satisfied that at the relevant time in this case, the reduced CD4 count caused a substantial impact upon the Claimant's ability to seek advice or information regarding employment disputes or to bring proceedings in this case. It is acknowledged that the Claimant said he was 'physically sick' when cross examined by Orange Square's counsel, Ms Meredith, but he did not provide evidence which indicated a degree of incapacity which would affect his ability to consider his employment issues and to make enquiries on line or by phone.

(26) Turning to the events leading up to the Claimant's dismissal by Orange Square, the Claimant was asked about the withdrawal of his store approval by John Lewis. I had seen the Withdrawal of Store Approval sheet dated 16 March 2018 (pages 146 and 147 of the 'Bundle') and the letter dated 17 March 2018 sent by Helen Turner at John Lewis to Sarah Millar at Orange Square confirming that the Claimant's store approval had been withdrawn (page 148). It was not a matter of dispute between the parties that the Claimant required store approval in order that he could work on the John Lewis Cambridge site and that this was withdrawn by John Lewis for reasons which they believed were due their concerns regarding the Claimant's conduct. While the reasons behind this decision remained in issue, it was relevant that the withdrawal of Store Approval on page 147 recorded the Claimant saying *"he was 'considering' raising a grievance".* Having considered the available documentary evidence and having heard oral evidence from the Claimant concerning this particular matter, I am satisfied that a formal grievance was not raised by the Claimant and was not deemed to have been raised by either Respondent at that stage.

(27) The additional documentation provided by John Lewis included an email from the Claimant to Sarah Millar dated 1 March 2018 (marked 'R1') and which informs her of his ill health and absence from work due to anxiety, but also that he was seeking legal advice and 'citizens advice services'. He said he was not comfortable speaking with the John Lewis's managers and asked her to speak with them. Although the Claimant was cross examined concerning this document, he did not seek to dispute its contents, although there was some disagreement by him as to what advice he had actually sought at this stage.

(28) Additional document 'R2' involved an email between the Second Respondent and the Claimant on 13 to 14 March 2018. In his email of 14 March 2018, the Claimant advised that he had seen his GP and had also spoken to ACAS and the Citizens Advice Centre in Cambridge. The Claimant added that this was 'as

stated to Sarah' and I believe that this must be referring to the email document R1. The Claimant's email in R2 complains of discrimination, victimisation, bullying and derogatory behaviour at work since 28 September 2017. The Claimant felt that he had alerted John Lewis on many occasions and also Orange Square. The tone of the email clearly reveals that the Claimant was very unhappy with John Lewis' line managers and that he was also seeking legal advice. He was signed off from work at this time. Additional document 'R3' was a Med3 fit note and confirmed that he was signed off work from 8 March 2018 to 31 March 2018. The Claimant did not dispute the contents of the emails, although he disputed that advice had been sought by the Claimant at this stage from either ACAS, the CAB or solicitors.

(29) A document that was not disputed was the letter entitled 'Notice of Termination of Employment' dated 26 March 2018 (page 149 of the Bundle). This was from Val Chalmers at Orange Square to the Claimant and which advised him that because of the withdrawal of store approval by John Lewis and their refusal to reconsider, there were no suitable vacancies for the Claimant and his employment was to be terminated with an effective date of termination of 22 April 2018. No mention is made in the letter of a grievance being considered by john Lewis or any ongoing mediation.

(30) The oral evidence of the Claimant was lengthy in proportion to the issues to be considered and during cross examination there appeared to be some confusion on his part as to when he began to feel he may have had an employment law complaint, when he contacted the CAB, ACAS or a solicitor and the manner in which these contacts took place. It was understandable that the Claimant may have been feeling distressed, both in relation to his work based issues and his health issues arising from HIV. However, he did give evidence that he was discussing his concerns regarding his employment with a friend who is a family solicitor at a social meeting over wine in late January 2018, following his return from a holiday to India earlier that month.

(31) I recognise that for a Claimant who is initially without representation and who does not have the funds to pay for a solicitor, it can be difficult to negotiate the area of employment rights and to consider what remedies are available. This may have been exacerbated by the Claimant's reluctance to leave the house while his CD4 blood count was low. However, it was clear that during his evidence, he had always been aware of the CAB. Indeed, while it was not entirely clear what communication he had had with the CAB, ACAS, solicitors and when this had taken place, the disclosed documentation indicated that from early March, the Claimant was considering legal action concerning his perceived treatment at John Lewis and he was willing to let his employer know that this was the case. Moreover, it was also reasonable to conclude from both documentary and oral evidence that the Claimant is IT literate and was using emails and the internet to consider his position further.

(32) What was not in dispute was that the ACAS Early Conciliation request was received on 9 July 2018 and was issued on the same day. The ET1 Claim Form was presented on 17 July 2018 and this was when the Claimant's claims were commenced with the Tribunal.

The Legal Framework

Time Limits for Whistleblowing cases under the Employment Rights Act 1996

(33) Section 48(3) provides that a Tribunal shall not consider such a complaint unless it is presented to the Tribunal: (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or where, that act or failure is part of series of similar acts or failures, the last of them; or, (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(34) This is the same test as applies to Section 111(2) of the ERA for complaints of unfair dismissal.

(35) The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. One of the leading cases is Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of "reasonable feasibility" (in other words somewhere between the physical possibility and pure reasonableness).

(36) In Adsa Stores Ltd v Kauser EAT 0165/07 Lady Smith described the reasonably practicable test as follows: "the relevant test is not simply looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done".

(37) A number of factors may need to be considered. The list of factors is non-exhaustive but may include:

(i) The manner and reason for the detriment;

(ii) The extent to which the internal grievance process was in use;

(iii) Physical or mental impairment (including illness – see Shultz v Esso [1999] IRLR 488 CA, a case concerning a claimant suffering from a depressive illness, as to the approach for the Tribunal to adopt when determining the "reasonably practicability" question):

(iv) Whether the Claimant knew of his rights. **Ignorance of the right to make a claim** may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. In such cases the Tribunal must ask: what were the claimant's opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? See Dedman v British Building and Engineering Appliances Ltd 1974 ICR 54 CA. In other

words, ought the claimant to have known of his rights? **Ignorance of time limits** will rarely be acceptable as a reason for delay and a claimant who is aware if his rights will generally be taken to have been put on enquiry as to the time limits.

(v) Any misrepresentation on the part of the Respondent;

(vi) Reasonable ignorance of fact;

(vii) Any advice given by professional and other advisors (such as the CAB). Aa claimant's remedy for incorrect advice will usually lead to a remedy against the advisors and the incorrect advice unlikely to have made it not reasonably practicable to have presented the claim within the statutory time limit. See for example: Dedman (cited above); Wall's Meat Co Ltd v Khan 1979 ICR 52 CA.

(viii) Postal delays/losses

(ix) The substantive cause of the Claimant's failure to comply.

Time Limits under the Equality Act 2010

(38) Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

(39) In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they consider it just and equitable in the circumstances to do so. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. In accordance with British Coal Corporation v Keeble [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and

Tribunals do not need to consider all the factors in each and every case; see Department of Constitutional Affairs v Jones [2008] IRLR 128.

(40) I am grateful to the parties for providing hard copies of cases as part of their final submissions. In particular, I considered the case Chohan v Derby Law Centre [2004] UKEAT/0851/03/ILB and Virdi v Commissioner of Police of the Metropolis & another [2006] UKEAT/0373/06/RN (provided by Mr Jackson) and Miller & others v The Ministry of Justice and others [2016] UKEAT/0003/15/LA (provided by Mr Graham). Ms Meredith in oral submissions, also referred to the cases of Trevelyan's (Birmingham) Ltd v Norton ICR 488 and Dedman v British Building and Engineering Appliances Limited [1974] ICR 53 CA. This is not an exhaustive list and the parties' representatives were of great assistance to the Tribunal in considering this issue.

Discussion

The relevant date(s) from which time should be calculated

(41) In his list of issues attached to his Claim Form ET1 and his amended list dated 19 March 2019, the Claimant relied upon a course of potentially discriminatory conduct ending on 23 February 2018. This last event concerned an incident which took place at the John Lewis store in Cambridge. These relate to the complaints of harassment and victimisation under the EQA and from which date a grievance was identified by the Claimant. The incident on 23 February 2018 which involved the Claimant sending a video recording of the incident on the same day to Sarah Miller at Orange Square, is also relied upon as being the relevant disclosure for the whistleblowing complaint under the ERA.

(42) Mr Jackson did not spend much time in his submissions concerning the relevant date for calculating time in relation to the claims brought under the EQA and whistleblowing. However, it was not in dispute that the question of whether a grievance was brought or alternatively a failure to consider a grievance by the Respondents could amount to a continuing act which could extend the relevant date under section 123 of the EQA. The Claimant's argument was that the failure of the Respondents to deal with this resulted in a continuing act which extended time towards the effective date of termination on 22 April 2018, or possibly beyond it. Similarly, the failure by the First or Second Respondent to act upon the Claimant's disclosure of the video clip of 23 February 2018 was also a relevant act with their continuing failure to respond to its disclosure also extending the relevant date towards the effective date of termination for the purposes of the whistleblowing complaint.

(43) Mr Graham for John Lewis was of the view that the Claimant could not have had a reasonable expectation that the threatened grievance would be addressed by John Lewis and the withdrawal of store approval on 16 March 2018 was the last possible date when the Claimant could have had confidence that a grievance would be dealt with by them. These submissions were adopted by Ms Meredith for Orange Square in relation to any expectations by the Claimant of them.

(44) The Claimant did not produce any documentary evidence which might support his contention that he had formally raised a grievance or that he had put the Respondents on notice that a grievance was effectively being raised. The first occasion when a grievance was alluded to by the Claimant was in his email of 14 March 2018 (document R2). At the hearing, I did not see any emails from either Respondent acknowledging that a grievance had been brought or inviting the Claimant to raise a grievance using their internal processes or in accordance with ACAS guidance. Unfortunately, I found the Claimant's oral evidence to be somewhat inconsistent during cross examination and in any event he gave little additional evidence concerning his expectations concerning the grievance or how he expected the disclosed video evidence to be dealt with. This is not a criticism of the Claimant as considerable time has elapsed since the relevant incidents took place and certainly in the early stages of these proceedings, he was unrepresented. However, he did not provide any meaningful evidence that contradicted the documentation available at the hearing or which provided further clarification as to what was in his mind concerning the threatened grievance and what efforts he made to press the Respondents to deal with this issue.

(45) As a consequence, I believe it is essential to consider the limited number of relevant contemporaneous documents that were produced at the hearing and which primarily involved correspondence between he parties. The John Lewis Withdrawal of Store Approval notice dated 16 March 2018, refers to the incident on 23 February 2018 and that the Claimant said during that incident that he was considering raising a grievance. I am of the opinion that by the time the Claimant sent his email on 1 March 2018 to Sarah Millar at Orange Square, he was contemplating legal advice and contacting the CAB. This was reinforced in his subsequent email of 14 March to 2018 Val Chalmers at Orange Square and where he mentions the possibility of raising a grievance to the Second Respondent.

(46) While I have not seen any evidence that the Claimant actually raised a formal grievance with either Respondent, it is reasonable to conclude that he felt he had given them notice to investigate his concerns by no later than his email of the 14 March 2018. If this is the case, he should have expected either or both Respondents to have considered the issue of a grievance and to have mentioned it in subsequent correspondence. This would have probably involved confirmation that the matter was being dealt with under their respective grievance procedures or alternatively, inviting him to raise a grievance formally and informing him how to do so. No documentary evidence was available confirming that this was the case, nor did the Claimant give any reliable evidence of telephone conversations that had taken place discussing the raising of grievance either following the incident on 23 February 2018 or in subsequent email correspondence on 1 or 14 March 2018.

(47) The dismissal letter sent by Orange Square to the Claimant on 26 March 2018 makes no mention of an outstanding grievance and indeed it is clear in this letter that John Lewis were not changing their mind about the withdrawal of store approval and that mediation is not an option.

(48) Accordingly, in the absence of any further information concerning the progression or otherwise of the proposed grievance, I find that for the purposes of the complaints brought under the EQA and whistleblowing, the last date when the Claimant could have expected a grievance to be dealt with would have been when he received the letter dated 26 March 2018. This would normally have been received by no later than 28 March 2018 if it was sent by post. There is no evidence of any further challenge from the Claimant concerning a grievance after this date.

(49) I find that by presenting his Claim Form ET1 on 17 July 2018, the complaint of whistleblowing was out of time in accordance with section 48(3)(a) of the ERA. This was because by 28 March 2018, the Claimant was on notice of the failure of the Respondents to deal with his grievance. As a consequence, more than 3 months had elapsed from this relevant date by the time the ET1 was presented.

(50) Similarly, I also find that the complaints under the EQA were also presented out of time in that the final act of potential discrimination (in a chain of earlier occurring events), namely the failure to address the potential grievance had become clear by 28 March 2018. More than 3 months had elapsed since the relevant event by the time the ET1 was presented.

(51) For any of these complaints to be presented on time, at the latest it should have been presented by no later than 27 June 2018. As the ACAS Early Conciliation Certificate was applied for and issued on 8 July 2018, early conciliation had no material impact upon time limits in this case.

Extension of time in Whistleblowing complaint

(52) I am now required to consider whether it is reasonable for the Tribunal to extend time in relation to the whistleblowing complaint, on the basis that it was not reasonably practicable for the Claimant to present his complaint within the 3 month period.

(53) I heard some evidence at length from the Claimant concerning his ill health and as I have already found, I am not satisfied that this had a material bearing upon his physical ability to present a claim in time

(54) It was clear from the oral evidence given by the Claimant that he was contemplating doing something regarding his employment issues at work when he discussed his concerns with a friend in January 2018. The correspondence produced at the hearing and already discussed in this judgment clearly indicate that the Claimant was approaching or at least looking to approach the CAB, ACAS and solicitors. While he gave oral evidence concerning the difficulties that he faced in attending public places when his CD4 count was low, he was not able to explain why he could not make any progress using the telephone, emails or internet. There is no doubt that he was aware of potential employment rights from the available documentary evidence and that if he had not yet found legal representation or had obtained legal advice, he was able to

find the necessary information on line and even present a complaint to ACAS and the Tribunal electronically. While the Claimant's oral evidence was not clear concerning the time when he had a meaningful contact with ACAS, I find it unlikely that he had not at the very least accessed their website by March 2018 given that he referred to them in his email dated 14 March 2018.

(55) The case of Dedman (above), warns that ignorance of the time limits will rarely be acceptable as a reason. There is no suggestion that the Respondents sought to mislead the Claimant as to the relevant dates in this case or that the Claimant received misleading advice during March 2018. His request for early conciliation with ACAS did not take place until 8 July 2018 and by this stage, these complaints were already out of time.

(56) It is for these reasons that I find that it is not reasonable for the Tribunal to extend to time to 17 July 2018 when the Claim Form ET1 was presented and it was reasonably practicable for the Claimant to have presented his claim within the standard 3 month period.

(57) Accordingly, this complaint of whistleblowing is dismissed as the Tribunal has no jurisdiction to hear it.

Extension of time in the Equality Act Complaints

(58) Turning to the question of the complaints under the EQA, I now consider whether it would be just and equitable for the Tribunal to extend time under section 123(1)(b) EQA.

(59) When considering it's the exercise of its discretion, Auld LJ in the decision of Robertson v Bexley [2003] makes clear that I have a wide ambit within which to reach a decision. It is however, for the Claimant to convince me that it is just and equitable to extend time. I should also take all significant factors into account.

(60) There has clearly been a delay in the Claimant presenting the claim on 17 July 2018 of a number of weeks. As I have already determined, I do not find that the Claimant's ill health was a substantial factor that prevented him from presenting the claim before 17 July 2018 and accordingly, I do not accept that this was a relevant issue in considering whether time should be extended.

(61) Mr Jackson for the Claimant does make a reasonable submission that this case is complicated by there being two Respondents and the questions of calculating relevant dates for the purposes of time limits would not necessarily be an easy exercise. However, it was clear by the time that the Claimant received his letter of 26 March 2018, that his relationship with both Respondents was coming to an end. On his own evidence, he had been raising issues internally within John Lewis and by the end of January 2018, when he discussed the matter with his friend, he was contemplating taking matters further. Even before the letter of 26 March 2018 was sent, the Claimant was sending emails that identified potential

further action and he was in a position to at the very least notify ACAS, whom he identified in his email of 14 March 2018.

(62) While I recognise that the Claimant was feeling very unhappy at the beginning of 2018, I was struck by his ability to raise issues with his employer Orange Square and with John Lewis when working at their store. He demonstrated an ability to identify potential avenues to help him resolve his issues and at the very least, I believe it would have been reasonable to expect the Claimant to notify ACAS long before 9 July 2018 with a view to early conciliation. In the absence of any documentary evidence to demonstrate what the Claimant had done with regard to progressing claim between 26 March 2018 letter and 9 July 2018 ACAS early conciliation application, I am left to consider the Claimant's oral evidence as to what steps he had taken. Unfortunately, this evidence was uneven and contradictory and I was left with the conclusion that the Claimant delayed taking any steps towards obtaining advice or information concerning time limits.

(63) I have taken into account the submissions concerning the balance of prejudice that would be faced by the Respondents in allowing time to be extended in these claims. It is fair to say that case management has already established that the determination of merits in this case will be a lengthy exercise and will require a hearing length of 10 days with many witnesses having being called. Additionally, concern has been expressed about the delay that has taken in this case and risk that the memories of witnesses will have faded. While I recognise the concerns being raised, I do not think it is fair to say that the delay in this case has been caused by the Claimant. It is always difficult to list a lengthy multi day case with numerous witnesses and also additional issues have had to be resolved, including the preliminary issue. In that respect, I am not satisfied that this is a material factor in considering whether or not it is just and equitable to extend time.

(64) I recognise that the Claimant has not had the easiest of times during the first half of 2018, but he clearly was taking steps to protect his position up to and including March 2018. Unfortunately, he appeared to take no further action until 3 months had elapsed. This was despite the Claimant having sufficient knowledge of the CAB, ACAS and good IT skills to allow him to quickly make the necessary enquiries. The Claimant presented his Claim Form ET1 without representation on 17 July 2018 and as this was in a simplistic form with a detailed chronology of events, I see no reasonable explanation why the Claimant could not have presented his claim on an earlier date. This is not a matter of the Claimant working hard to progress his claim and missing the time limit by a day or two and the Claimant appears to have left the matter to drift .

(65) For this reason, I find that the there are no just and equitable grounds for time to be extended to 17 July 2018 and the complaints of Harassment and Victimisation under the Equality Act 2010 are dismissed as the Tribunal has no jurisdiction to hear it.

Remaining Issues

(66) The complaint of Automatic Unfair Dismissal presented under section 103A remains as the only live complaint in these proceedings with the Second Respondent Orange Square being the only Respondent in this claim

(67) Accordingly, as there are no remaining live claims against the First Respondent John Lewis, all claims against this party are dismissed.

(68) The case will be listed for a further Closed Preliminary Hearing on a date to be advised. If possible and at the parties' request, the hearing will be a telephone hearing.

(69) The First Respondent has given notice that it wishes to make an application for a Deposit Order against the Claimant in accordance with Rule 39 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

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Employment Judge Johnson 1.08.19

Sent to the parties on:

……08.08.19.………….

For the Tribunal:

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